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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 19 2010

LIN 07 134 51983

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a resort hotel.[1] It seeks to employ the beneficiary permanently in the United States as an executive manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the ETA Form 9089 did not support the requested classification as a member of the professions holding an advanced degree. Accordingly, the director denied the petition.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

On appeal, counsel asserts that a bachelor's degree and five years of work experience gained after the bachelor's degree also satisfy the educational requirements for the requested EB-2 classification, and cites an interoffice memorandum written by [redacted]

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[1] The record reflects that the instant petition was filed on April 5, 2007. The petitioner filed an earlier I-140 petition on January 12, 2006 under the professional/skilled worker classification that was approved on April 14, 2006.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[redacted] Counsel notes that the Form ETA 9089 reflects in Item H.4, that a bachelor's degree in any discipline is acceptable, and that Items H-6 and H-10, reflect that 60 months in the job or 60 months as Assistant Executive Manager, Hotel Manager, Operations Manager, or Food & Beverage Manager are acceptable. Counsel states that the petitioner conducted its recruitment for the position with the requirements of a bachelor's degree and five years of work experience in mind.

Counsel submits the petitioner's PERM recruitment report with a description of the thirty one candidates who responded to the petitioner's job advertisements. Counsel also submits the Arizona Department of Economic Security Prevailing Wage Determination for the position[4] and the petitioner's posting notice.[5] Counsel also notes that the director implied that the proffered position does not require an advanced degree or even a bachelor's degree. Counsel resubmits four letters from officers of large hotels or officers of hotel executive recruitment services all dated 2003, that state that the proffered job within the petitioner's senior level of management required extensive work experience and a bachelor's degree or its equivalent, preferably in a business or hospitality related curricula, or a degree in hospitality or a similar degree from an accredited university.

Counsel also submits a copy of the BIA decision *Matter of Sun* 12 I&N Dec. 535(BIA 1966) and states that this decision determined that a hotel manager in its more complex form in a large hotel may be considered as a profession. [6] Counsel provides six organizational management charts dated July 2007 that identify the beneficiary as the operations director for catering and conference services, destination services, food and beverage management, spa operations, and operations manager on the executive committee. Counsel also submits the petitioner's website describing the history, actual operations, and awards received by the petitioner. Finally counsel submits an excerpt from the Foreign Labor Certification Online Wage Library and Data center on the occupational title of private sector executives, with the description of the *O*Net* Job Zone Five.

Counsel asserts that the petitioner conducted recruitment with the requirements of a bachelor's degree and five years of work experience in mind, and that the position of Executive Manager of the Arizona Biltmore Resort and Spa clearly requires at least a bachelor's degree and five years of experience. Counsel states that USCIS failed to examine the beneficiary's work experience when considering the petition. Counsel states that the beneficiary is second in command of a hotel that has 1,400 employees, nearly $100 million in gross annual revenues, 738 guest accommodations including 78 villas, an 18 holes championship golf course and numerous departments. Counsel also

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[3] Memorandum from Michael D. Cronin, Acting Associate Commissioner, Office of Programs, and William R. Yates, Deputy Executive Associate Commissions, Office of Field Operations, *Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants,* AD00-08, March 20, 2000.

[4] This document reflects the educational and work experience as a bachelor's degree in any discipline with five years of work experience and with a skill level of two.

[5] This document indicates that a bachelor's degree or foreign equivalent in any discipline plus five years of work experience is required for the proffered job.

[6] The AAO notes that the precedent decision involved a beneficiary who had a U.S. bachelor of science degree in hotel management.

states that since its opening in 1929, the petitioner has been a playground of celebrities and has hosted every president of the United States since Herbert Hoover. Counsel states that the job duties associated with the proffered position re sufficiently complex that a bachelor's degree and five years of experience are required.

Based on the director's decision dated November 19, 2007, the single issue is whether the proffered job requires a member of the professions. The AAO will also examine whether the beneficiary is eligible for the classification and whether the beneficiary meets the requirements of the proffered position. The AAO will first examine whether proffered job requires a member of the professions.

As defined at Section 101(a)(32) of the act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2), in pertinent part, defines "profession" as follows:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The director acknowledged these definitions, relying on *Matter of Shin,* 11 I&N Dec. 686 (Dist. Dir. 1966) and *Matter of Palanky,* 12 I&N Dec. 66 (Regl. Commr. 1966), for the proposition that the degree must be related to the field. We note that in *Matter of Shin,* 11 I&N Dec. at 688, the District Director did not state that a degree in and of itself was insufficient; rather, the "knowledge acquired must also be of [a] nature that is a realistic prerequisite to entry into the particular field of endeavor." The following discussion, however, was limited to the level of education required, not the major field of study. Moreover, *Matter of Palanky,* 12 I&N Dec. at 68, addressed an occupation that did not require a full baccalaureate. Most significantly, these cases predate the regulation at 8 C.F.R. § 204.5(k)(2). Therefore, the AAO must defer to the definition in that regulation, which states only that a profession must require a baccalaureate for entry into the occupation.

The AAO emphasizes, however, that in considering whether the job requires a member of the professions or whether the beneficiary is a member of that profession, the AAO relies on the definition of "profession" at 8 C.F.R. § 204.5(k)(2). This definition is used by USCIS in determining whether an alien is qualified for the classification sought in this matter, a determination that is solely under USCIS jurisdiction. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).[7] In other words, DOL certification does not bind the AAO in determinations of eligibility for a visa classification. Moreover, the regulation provides that a profession is an occupation for which a United States baccalaureate degree or its foreign equivalent is the *minimum* requirement for *entry* into the occupation. Thus, some professions

[7] *But cf. Hoosier Care, Inc. v. Chertoff,* 482 F. 3d 987 (7th Cir. 2007) relating to a lesser classification than the one involved in this matter and relying on the regulation at 8 C.F.R. § 204.5(l)(4), a provision that does not relate to the classification sought here.

may require *more* than a baccalaureate in an unspecified field for *entry* into that particular profession. In such cases, the director would be justified in considering, independent of whether the alien meets the job requirements certified by DOL and is a member of some other profession, whether the alien can truly be considered a member of the profession associated with the occupation certified by DOL. The AAO notes that being a member of the professions does not entitle the alien to classification as a professional if he does not seek to continue working in that profession. *See Matter of Shah,* 17 I&N Dec. 244, 246-47 (Regl. Commr. 1977).

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in any discipline is the minimum level of education required. Line 6 reflects that 60 months of work experience is required for the position, and Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable. Line 10-B reflects that experience in the alternate occupations of assistant executive manager, hotel manager, operations manager, food and beverages is also acceptable. Line H-14 reflects that special skills or requirements include experience in managing large hotel/resort with health spa, multiple restaurants and lounges, convention space, and multi-million dollars food and beverage budget.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The occupation of the offered position is determined by the DOL and its classification code is notated on the labor certification. The DOL previously used the Dictionary of Occupational Titles (DOT) to classify occupations. O*NET is the current occupational classification system in use by the DOL. [8] O*NET incorporates the Standard Occupational Classification (SOC) system,[9] which is

[8]O*NET, located at http://online.onetcenter.org, is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations" (accessed September 26, 2009).

designed to cover all occupations in the United States.[10] The SOC classifies workers at four levels of aggregation: major group; minor group; broad occupation; and detailed occupation. All SOC occupations are assigned a six-digit code. The first and second digits represent the major group; the third digit represents the minor group; the fourth and fifth digits represent the broad occupation; and the sixth digit represents the detailed occupation.[11] In cases where the O*NET-SOC occupation is more detailed than the original SOC detailed occupation, it is assigned the six-digit SOC code from which it originated, along with a two-digit extension starting with .01, depending on the number of detailed O*NET-SOC occupations linked to the particular SOC detailed occupation.[12]

In the instant case, the DOL categorized the offered position under O*NET-SOC code of 11-1011.02 with the title private sector executive. The code indicates an SOC detailed occupation under the broader SOC code of ll-1011.00, Chief Executives. This position falls within Job Zone Five requiring extensive preparation for the occupation type closest to the proffered position. The SOC description states: "Most of these occupations require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree). Extensive skill, knowledge, and experience are needed for these occupations. Many require more than five years of experience. For example, surgeons must complete four years of college and an additional five to seven years of specialized medical training to be able to do their job."

The AAO notes that counsel on appeal refers to the classification of hotel managers for the instant petition. The *Occupational Outlook Handbook* (The Handbook) provides the following information with regard to the educational requirements for this alternate title. See http://www.bls.gov/oco/cg/cgs036.htm (accessed on March 29, 2010.)

> People with these qualities still advance to manager jobs, but, more recently, lodging chains have primarily been hiring persons with 4-year college degrees in the liberal arts or other fields and starting them in assistant manager or management trainee positions. Bachelor's and Master's degree programs in hotel, restaurant, and hospitality management provide the strongest background for a career as a hotel manager, with nearly 150 colleges and universities offering such programs. Graduates of these programs are highly sought by employers in this industry because of their familiarity with technical issues and their ability to learn related skills quickly. Eventually, they may advance to a top management position in a hotel or a corporate management position in a large chain operation.

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[9]http://www.onetcenter.org/taxonomy.html (accessed September 26, 2009).

[10]http://www.bls.gov/soc/socguide.htm(accessed September 26, 2009).

[11]http://www.onetcenter.org/dl_files/UpdatingTaxonomy2009_Summary.pdf (accessed September 26, 2009).

[12]http://www.onetcenter.org/dl_files/UpdatingTaxonomy2009_Summary.pdf (accessed September 26, 2009).

Alternatively, if the *Handbook* is utilized to examine the job category of top executives within the hospitality or hotel management field, it states: "Many top executives have a bachelor's or master's degree in business administration, liberal arts, or a more specialized discipline. The specific type and level of education required often depends on the type of organization for which top executives work."

Thus, the petitioner's recruitment report and the DOL's *O*Net*/SOC classifications for Chief Executives, as well as the *Handbook* descriptions of the more general classification of Hotel Managers and top executives support that the proffered position is a professionalposition that rquires a bachelor of science or higher as minimum.

Nevertheless the petitioner must establish that the beneficiary is both eligible for the classification and meets the requirements of the labor certification.

The record contains the following documents;

An educational and work experience evaluation written by [redacted] International Education Council, dated December 12, 2003. [redacted] states that the specialty occupation[13] described requires skills and knowledge for which U.S. colleges and universities commonly offer specialized courses leading to a degree. [redacted] also states that the beneficiary through his professional education and work experience has acquired the equivalent of a four-year degree from an accredited U.S. college or university. In examining the beneficiary's educational credentials, [redacted] states that the beneficiary had two years of years of university studies in general education and business administration based on his three years of studies at Mount Allison University, New Brunswick, Canada from 1982 to 1985, and two years of university level studies in liberal studies at Acadia University, Nova Scotia.

[redacted] states that the beneficiary's studies at Mount Allison University are equivalent to two years of lower-level studies in business administration and that the beneficiary's sixteen years of work experience are equivalent to two years of upper-level university level studies in hotel and restaurant management toward a four-year bachelor degree from an accredited U.S. college or university. [redacted] concludes that the beneficiary's professional education and work experience are equivalent to a Bachelor of Arts degree in Business Administration with a concentration in hotel and restaurant management. [redacted] did not examine any equivalency for the beneficiary's two years of university level studies in liberal arts at Acadia University.

A statement from [redacted], Portland State University, dated December 16, 2003. [redacted] states that the Foundation of International Services (FIS)[14] requested that he

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[13] The AAO notes that this document appear to have been submitted in support of the beneficiary's prior H-1B non-immigrant visa application in which the term specialty occupation is utilized.

[14] The record does not contain an educational equivalency report from FIS.

determine whether the beneficiary had the equivalent of a bachelor's degree in hotel and restaurant management. [redacted] states that FIS determined that the beneficiary earned approximately two years of university level credit form his studies at Mount Allison University and three years of university level credit for the beneficiary's Bachelor of Arts degree at Acadia University. [redacted] utilized the equivalency of three years of relevant and significant work experience in business to one year of university education in business administration to determine that the beneficiary had the equivalent of four years of upper level university level credit in business administration, management and hotel and restaurant management. [redacted] concludes that based on the beneficiary's university level academic credentials and his more than fifteen years of relevant work experience, the beneficiary exceeds the educational equivalent of a bachelor's degree in hotel and restaurant management;

A diploma from Acadia University that states the beneficiary earned a bachelor of arts from the Faculty of Arts in May 1988;

A letter from [redacted] dated December 12, 2003 that states the beneficiary graduated from Acadia University with a Bachelor of Arts degree with a major in history;

A transcript of the beneficiary's classes taken in 1986 and 1987 at Acadia University that lists fifteen classes with seven additional classes noted as transfers; and

An unofficial transcript of the beneficiary's intermittent three years of studies at Mount Allison University.

The evidence in the record reflects that the beneficiary possesses a three-year bachelor's degree in history from Acadia University, Nova Scotia, Canada, based on his studies at Mount Allison University and Acadia University. Thus, the issues are whether the beneficiary's combined studies resulting in one degree is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's years of experience in addition to that degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone

unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation

required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a combination of the beneficiary's studies at Mt. Allison University and Arcadia University will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[15] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien

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[15] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). The record reflects that the beneficiary received a diploma from Arcadia University for what appears to be two years of university level study in liberal arts, plus transfer credits from Mount Allison University. Thus the beneficiary does not a single baccalaureate degree that is equivalent to a U.S. baccalaureate degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in any discipline is the minimum level of education required. Line 6 reflects that 60 months of work experience in the proffered job is required for the position. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable. Finally lines 10 and 10 B reflect that a foreign education equivalent is acceptable and that 60 months of work experience as an assistant executive manager, hotel manager, operations manager, Food and Beverage is also acceptable. Section H, line 14 reflects specific skills or other requirements as follows: "Experience in managing large hotel/resort with health spa, multiple restaurants and lounges, convention space, and multi-million dollars food and beverage budget required."

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). As previously discussed, the record does not contain an FIS educational equivalency report, but rather the petitioner submitted the statements by [redacted] and [redacted]

Both [redacted] and statements use the rule to equate three years of experience for one year of education, but this equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. There is no comparable provisions in the I-140 context that allows for equating work experience to educational credentials. *See* 8 CFR § 214.2(h)(4)(iii)(D)(*5*). The beneficiary was

required to have a four-year bachelor's degree on the Form ETA 9089. Thus the AAO gives no weight to either advisory opinion. The director's decision to deny the petition must be affirmed because the beneficiary does not have a single source foreign degree that is equivalent to a four-year bachelor's degree from an accredited U.S. university or college.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.accrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://accraoedge.accrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials." With regard to both the New Brunswick and Nova Scotia system of education, EDGE states that a three-year baccalaureate degree is equivalent to three years of university-level studies at a U.S. college or university. See http://aacraoedge .aacrao.org/credentialsAdvice.php?countryId=250&credentialID=732 (accessed on March 31, 2010.)

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.